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No. 225 & 236.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE AMERICAN SUGAR REFINING Company, petitioner,
v.
THE UNITED STATES.
} Nos. 225 and 236.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

I.

THE RULE OF FINALITY OF APPRAISEMENT AND ITS EXCEPTION.

The appraisement, or where reappraisement is sought, the reappraisement of merchandise, is final and conclusive under section 13 of the customs administrative act unless the appraising officers have proceeded upon some wrong principle contrary to law. If this exception does not appear in the present case, the importer has exhausted his remedy under the law, has no further recourse, and may not be heard. It is unnecessary to multiply authorities for this statement. The cases of *Auffmordt* v. *Hedden* (137 U. S., 310) and *Passavant* v.

United States (148 U. S., 214, 220) are sufficient authority for the general principle, while the second case of *Passavant* v. *United States* (169 U. S., 16) expresses the exception from that principle, citing earlier authorities.

II.

THE FACTS.

The only question, then, is whether the appraisement herein proceeded upon a wrong principle contrary to law. The first requisite is to discover just what the appraisers did.

In the three importations covered by No. 225 the appraiser reported to the collector as to two of them that the value of the sugar was advanced per unit of quantity 1s. 1d. per cwt. from the market value when shipped to the value in the condition as landed, "owing to its increased value due to drainage on the voyage of importation." As to the third importation, the report was of the same purport, but the respective values and the advance per unit of quantity and the polariscopic degree varied slightly from the other shipments. The sugar examiner, upon whose examination the appraiser's report was based, testified that the "market value" referred to in the report was the value of the sugars at the port of shipment in Brazil, of the quality landed and as examined here. The examiner then states that the sugars drain and moisture evaporates whether they stay in a storehouse in Brazil or, if shipped green, on the voyage of importation; and that the appraiser can

not tell whether the sugars are bought green or whether they are bought drained, and he shows that the increase in value due to drainage was imposed with due regard for the interests of the importers as not intending any fraud, so that they might "escape the penalty." That is, the Treasury Department was scrupulous to prevent the increase from showing an undervaluation. (Rec. No. 225, pp. 15–18.)

In No. 236 the Board of General Appraisers, upon reappraisement, found the actual market value or wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence imported as nearly 2 shillings per unit of weight (100 kilos) more than the invoice value. This made the "market value and price actually paid on basis of settlement * * * in packed condition" which was the "dutiable value in packed condition." And thereafter one of the general appraisers called as a witness testified that the price paid for such sugars is conditional, to be determined in this country with reference to loss of weight from decreased moisture on the voyage, and that upon this price settlement a certain test is made called the settlement test which is accepted by the Board of General Appraisers under an agreement between the Government and the importers as controlling, to which agreement these importers appear to have been a party (Rec. No. 236, p. 14). That is, the test of quality, and therefore of price upon the commercial transaction, was regarded as conclusive in determining the quantity or percentage of sugar on which

duty is to be paid. The use of the word "percentage" here plainly means that by quantity of sugar is intended the saccharine contents or strength or value under a polariscopic test. It was upon this settlement test that the advance in value was made, the advanced value being the equivalent in the country of exportation of sugar of the same test as that which arrived in the United States. "In other words," says the appraiser, "they held that the diminished quantity of sugar arriving in the United States was worth just as much as they paid for the original quantity as shipped from Brazil. We therefore found it on the basis of the settlement test to be 11s. 11d." (Rec. No. 236, pp. 10–13.)

Thus the question is seen to be whether the addition to value because of improved quality due to drainage—made with due regard for the protection of the importers from the technical charge of undervaluation, and in accordance with their own settlement of price, which postponed the completion of the transaction until the quality here after landing was shown—is contrary to law.

It is proper at this point to state the fact accurately regarding the effect of the drainage. Mr. Jacobs, the sugar examiner, says on page 19 of the record in No. 225 that such sugars will drain anywhere, and that evaporation is small because the drainage takes place; that the drainage is sometimes pumped out with the bilge and sold, and, if sufficiently valuable, would be classified as molasses, and, if entered—as it sometimes is—

would be taxed at the same rate as sugar. It seems likely that neither the witness nor the importers' counsel observed the direction to which this testimony was tending, because the effort of the importers' brief is to show that the drainage here was of more than water; that sugar and molasses drained away (for there is no claim that any of the sugar was damaged or lost by washing away), and that the drainings were valuable. Yet they took pains to show (Rec. No. 225, p. 20) that the American Sugar Refining Company never entered the drainage or bilge water pumpings and made no claim for damage allowance thereon. Now, it is obvious that if there had been any appreciable loss from drainage—if molasses or sugar to a valuable extent, as well as water, drained away—the importers themselves would have recovered the substance and would have entered it on their own account.

In this connection the importers' brief implies, or, indeed, says (p. 19), that 16 per cent of the sugar has been lost by drainage. "Sixteen out of every hundred pounds of sugar shipped as sugar disappeared during the voyage." But the statement of fact in the record is as follows (No. 236, p. 13, Mr. Sharretts being the witness): That the sugar as shipped contains 16 per cent of moisture, and that the importers pay less for it than if it contained 8 per cent; that proportionately to the moisture lost by drainage the sugar becomes more valuable because of drainage on the voyage of importation; that when it started it may have contained 16 per cent of moisture and when it was landed it may

have contained 8 per cent. So that the 16 per cent referred to in the importers' brief really means the total amount of moisture which the sugar contained upon shipment, of which half was lost during the voyage. This witness thinks that the loss in weight is due almost entirely to drainage of water. There may be some destruction or damage by which the sugar is washed away, but he evidently does not think so. "In all ordinary shipments of these goods the principal loss is due to the evaporation or the water being eliminated from the sugar." That is the principal loss in weight. (No. 236, p. 13.)

The importers' own witness, Mr. Sherer (No. 236, pp. 15–17)—who, if the strict rule as to the competency of witnesses upon such commercial questions had been enforced, could not properly have been heard—explained the trade price arrangement, the stipulation being that the loss of weight should not exceed a certain per cent, and final settlement was made upon that basis. He concedes that "the test was considered also on arrival here," and, speaking generally of such shipments, he thinks that they lost more or less not only of water but of sugar, and that the cargo continued to drain sugar and water all the way over, although what was left tested more and was worth a higher value. Nevertheless, on being asked the question, "Was the drainage in that case [that is, the invoice under consideration] lost on the voyage of any value?" his answer is, "No. It was a loss because it was pumped out with the bilge water." In other words, as we con-

tend, it was because it was of no appreciable value that the importers themselves did not enter it.

Of course, the importers, while making the point that the drainage decreased the sugar as well as the moisture, practically admit more than once in their brief that the gain in quality offsets the loss in weight; that for this reason they find it to their advantage to import green or wet sugars rather than dry or cured sugars, and thus lessen the cost of their raw material, and that, the plain language of the law giving them this legitimate opportunity to adapt their business in view of this advantage, it makes no difference that Congress did not see the defect or omission in the law, or that it is not pleasing to the equitable views of customs authorities or to the courts. All these things amount to a frank statement that the importer is taking advantage of the law, but, doubtless, without any covert or fraudulent methods. The only question is, Does the importer's view correctly state the law? The importer frankly says, in effect, that he has deliberately arranged his trade so as to bring an article into this country which loses in weight and gains in value upon the voyage, because he knows that only the weight landed can be taxed, and thinks it a fair venture to seek to establish the value of the *quality* shipped as the crucial test of foreign market value. The court will please observe that it is the *quality* rather than the *condition* of the merchandise shipped which is really involved. It is submitted that upon the matter of drainage we have shown sufficient evidence from the record, and indeed

from the testimony of the importer's own witness, as well as from that of one of the general appraisers, to justify completely the statement of Judge Townsend—referred to upon page 5 of their brief as based upon a radical misapprehension of the evidence and the law (see also Id., pp. 6, 7)—that the cargo is actually worth as much as when it started.

I venture to suggest that neither experience nor science justifies the notion that any appreciable quantity of saccharine matter is carried through the cargo to the bilge water. Bags of sugar thus superimposed upon each other naturally act like a filter, and as the water drops the sugar in solution will be caught and retained in the mass. This is probably the fact rather than that the water "takes toll" as it passes. Especially would this be the case because of the containers, the bags. Surely no molasses would pass through such a mass, nor any solution of water highly charged with saccharine crystals. The cloth fiber of the bags would act as a very fine sieve, which would permit the passage of the moisture of the water but retain the solid elements. One proof of this is the fact (not appearing in the record, but perfectly well known) that the importers themselves boil the bags and thus recover the sugar from them. I respectfully submit and urge that all the facts proved in this case, and necessarily existing because of the nature thereof, show beyond peradventure that nothing of substantial value passed into the bilge water; otherwise the importers themselves would have recovered the bilge-water contents as they ordinarily do the sugar held in the meshes of the bags.

III.

THE LAW OF THE CASE AND THE EQUITIES, AS INDICATED BY CERTAIN AUTHORITIES.

The customs administrative act records the final development of revenue procedure, and has replaced as a complete system all previous enactments upon the matters embraced therein. If an existing section of the Revised Statutes has not been specifically repealed by section 29 of the customs administrative act, it has quite as effectually disappeared under the general repeal clause of section 29, if the provision of the Revised Statutes is either repugnant to a provision of the customs administrative act or has been entirely supplied by the latter. The law of the Revised Statutes in that case is then practically obsolete. Thus section 2904 of the Revised Statutes, which the importers think requires the condition of imported merchandise to be appraised with reference to its "condition" upon the very day of shipment from the foreign port, is not properly invoked here, because the customs administrative act indicates the complete rule on the subject by carefully chosen language which is repeated several times in slightly different forms, and especially because of the provisions of section 19. And even if this were not so, section 2906, Revised Statutes, like section 2904, has not been specifically repealed, and section 2906 directs the appraisement to be made upon the actual foreign market value "*at the period* of the exportation to the United States." Section 2906 applies to the present case quite as much as section 2904, because

the one applies "when an ad valorem rate of duty is imposed on any imported merchandise" (sec. 2906) and the other applies "when the duty upon any imports shall be subject to be levied upon the true market value" in the foreign market (sec. 2904). So that, although the value in the foreign market of the merchandise in the "condition" as respects *quality* when landed here may be a more intricate inquiry if held to the "day of actual shipment" than if determined as of the "period of the exportation," such difficulty in degree of the inquiry by no means overthrows the true rule for which the Government contends, namely, the value in the foreign market of the *quality* landed here, and any remaining doubt upon that point is resolved when it is considered that neither section 2904 nor section 2906 gives the rule, but that the subject is controlled by the express law of the present revenue system under the customs administrative act.

PROVISIONS OF THE CUSTOMS ADMINISTRATIVE ACT.

Analyzing now that act, the attention of the court is called to the fact that all through the law the merchandise referred to is *imported merchandise*—that is to say, the merchandise as it reaches this country. That is one reason, probably the chief reason, why the weight *landed* is the test of dutiable weight. Both sense and justice combine to show that not the amount of merchandise shipped, but the amount of merchandise landed on our docks, represents the proper quantity or weight. That *is* the *imported merchandise.*

And again, all through the law the phrase "such merchandise" is constantly used, referring back to the words "imported merchandise." Thus it is in section 2 of the customs administrative act, in which *such merchandise* must be correctly described by the invoice; and again, in section 7, relating to the right of the importer to make an addition to his entry in a certain case, and then providing for additional duties and a penalty for intentional or constructive undervaluation. And so it is again in section 19, which is especially in issue in this litigation.

Now, we contend that the spirit, if not the actual language and intent, of such provisions as that in section 3 requiring the invoice to show all discounts, bounties, or drawbacks allowed, and section 4 requiring the importers to produce any papers or statements of account which may assist in the ascertainment of value (which requirements are, with some variation of language, incorporated in the declarations of section 5) shows that when any such arrangement appears as the test of quality in this country and postponed payment disclosed in this case, it is a highly proper proceeding and one really contemplated by the law, for the importers themselves to make addition to value. The law intends that the real value of the merchandise as landed, based upon the quality then shown and upon the importers' own agreement as to price and the method of determination thereof, should be placed upon the merchandise.

Of course, such voluntary accomplishment of the intent and the just purpose of the law could not, perhaps, be expected from importers who frankly say that

they are taking advantage (what they consider to be a fair advantage) of what they conceive to be the literal terms of the statute. On the other hand, in this case, as is shown by these records, and in the like case of hides, which improve in quality as they dry, as shown by Treasury records, the Government has been scrupulous to prevent the proper addition to invoice or entered value, based upon the principle which we are now invoking, from subjecting the importers to the technical charge of undervaluation and to the penalties therefor under section 7 of the customs administrative act.

I give in an appendix a letter addressed by the Secretary of the Treasury to the collector of customs at Philadelphia, dated April 16, 1896, which shows the Government attitude on this point in a case involving sugar. It seems proper to submit this letter to the court, although it is from unpublished records of the Treasury. I also insert in the appendix a recent letter from the Secretary of the Treasury to the collector of customs at New York, with the reply thereto, upon the aspect of the question, especially regarding undervaluation, in connection with hides.

Section 10 of the customs administrative act directs the appraisers to ascertain, estimate, and appraise, by all reasonable ways, irrespective of invoices, affidavits, or statements of cost, the actual market value of the merchandise (that is, the merchandise as *imported*) at the time of exportation to the United States. This broad direction covers clearly such a revision of value

as here, if only for the reason that the importers' own arrangement for test of quality and settlement of price shows the realities of the case and justifies the addition.

Section 11 authorizes the appraising officers, when the value can not otherwise be ascertained to their satisfaction, to ascertain the cost of production by cost of materials and fabrication and general expenses, including the expense of preparing for shipment. The concluding portion of that section permits the appraising officers in such doubtful case, in determining dutiable value, to take into consideration the wholesale price at which such or similar merchandise is sold or for sale in the United States, from which, we contend, it is evident that the foreign value of the merchandise as landed here may be reached by appraisers with a certain reference to the value of the same sort of merchandise in our own markets. This is a general and reasonable principle, and in construing that provision it should not be forgotten that, after all, the appraising officers are necessarily clothed with a wide discretion as to the means and processes by which they reach value; that their authority and discretion has been fully sustained by the courts, and that their conclusions are final, unless they have exceeded their authority and made a clear mistake. The statutes and the decisions leave no doubt that the nature of appraisement requires a rule on this point, subject to a particularly narrow range of exception.

The first sentence of section 2904, Revised Statutes, may be taken to imply that there are, or were under

previous laws, circumstances or merchandise in reference to which the foreign market value was not the test, or was not the sole test, which idea connects that section with the concluding portion of section 11 of the customs administrative act, *supra*. The distinction thus indicated may, however, refer only to the difference between *ad valorem* and specific duties.

Section 16 is further evidence that the appraising officers are intended to scrutinize the real nature of the transaction on the question of value, to take testimony irrespective of the importers' showing upon the invoice and entry, and, we submit, to carry into effect by an addition to value such a guide to the truth of the transaction as the price agreement here upon guaranty of maximum loss of weight and upon settlement test.

The significant language of section 19 is as follows:

> * * * Duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, * * * including the value of all * * * coverings of any kind, and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States.

It is first to be remarked upon this statute that the phrase relative to covers and condition is repeated in

various portions of the act specifically (e. g., in the declarations of section 5; and for general language of similar import see section 11), and refers to packing or preparation for shipment chiefly and perhaps solely. The word "condition" as first used in section 19 is to be construed by reference to the same word as used later in that section, in which plainly it refers to the preparation for shipment, and so it is in the other portions of the act where the same or similar language is used. In the declaration of the manufacturer or owner (section 5), just before these phrases in reference to coverings and condition "ready for shipment," appears the requirement that the invoice shall contain a just account of the cost of finishing the goods "to their present condition" Here is a further indication that the important condition is the *present condition*, the condition in which the goods arrive in this country. Of course it is evident that many kinds of goods, especially ordinary manufactured goods, do not change their condition, and that their present condition is the same substantially as their condition when shipped. But that is no reason for holding, when there *is* a change of condition, that the *present condition* does not refer to the state of the goods when they are landed. "Condition" in these provisions obviously refers, as the circuit court of appeals said, to the "preparedness of the merchandise for shipment."

Section 19 plainly requires that it is the value of *such merchandise* as is brought into this country which is to be determined as at the time of exportation to the United

States. So far as the language of the law is concerned it does not seem necessary to dwell more upon the reasons for the view of the courts below, as put by the circuit court of appeals, viz: "*It is incumbent upon the appraiser* to ascertain the value of *similar dry sugar in the markets of Brazil.*"

The astonishment of the learned counsel, who italicises similar statements from the opinions below, can not change the fact that under all the circumstances, and under the terms as well as the meaning of the law, it was very proper and precisely accurate to fix the value of the merchandise in view of the quality which arrives at the port of New York. Otherwise it would not be *such* merchandise, imported merchandise, which the appraisers were valuing; it would be the *exported* merchandise, the wet sugars as they left Brazil, a very different article from the goods imported. It was the latter merchandise and not the former which the appraisers were to inspect, examine, test, and appraise "by all reasonable ways and means" in order to ascertain the quality and value.

Section 23, providing a damage allowance, can in no way affect this question. The United States is not in the least responsible for the breaking of glass or the decaying of fruit on a voyage, and yet they say, properly as well as justly: "While we can not allow for a claim of damage unless it amounts to 10 per cent [which is entirely reasonable], you may, when the damage exceeds that percentage, abandon to the United States *all or any portion of* the goods, and so

be relieved from the payment of duties on the portion abandoned." The history of such provisions in the law shows that, as in the matter of undervaluation, there were great abuses in damage claims, and this statutory result is plainly in the interests of justice and recognizes a valid and proper claim to its full extent. The required minimum of 10 per cent is in the line of similar reservations all through the laws; that requirement is to insure good faith or to prevent trifling claims. There is no relation between the damage situation and the present one. The argument of the importers is that as the United States insists that the condition of the goods when exported shall be the test when there is loss or deterioration, so equally should it be the test when there is improvement in quality. But that analogy or antithesis is in no way justified by section 23. The United States simply says in that section, without reference to the condition of shipment, or to that condition as a test of dutiable quality, where the voyage results in substantial breakage, destruction, deterioration, or loss in other ways, "You may abandon to us the portion so damaged, and be relieved of duties *pro tanto*." That is all there is of the matter, and there is no such dilemma as the importer suggests.

THE DECISIONS AND THE TREASURY RULES.

Turning now to other guides in the law—the Treasury regulations and rulings, and the decisions—we find that upon the question of the value upon which duties

should be assessed the Treasury Department in T. D. 8159 formulated the rule that the weight of merchandise which arrived, multiplied by the proper value per unit of weight, was the correct rule in accordance with *Marriott* v. *Brune* (*infra*) and other authorities. This rule was revoked in T. D. 8380 in the "castile soap case," in accordance with the regulation then in force that no allowance should be made for difference in invoice weight and the weigher's return, for the reason that the value of the article appreciates in proportion to the diminution in weight. The Department was there reinstating a mistaken endeavor to find the proper rule, made previous to T. D. 8159, by which, instead of adding to the *value* of the *weight unit*, they sought to sustain the invoice weight. Ruling 8380 was the subject of litigation in the case of *Weaver & Sterry, Ltd.*, v. *Saltonstall, collector* (38 Fed. Rep., 493), in which Judge Colt sustained the importers' contention and held that the collector should have assessed duties only upon the *quantity* of soap which arrived in port, following *Marriott* v. *Brune*, and pointing out that that case held that the decision therein was not inconsistent with the proviso in section 8 of the act of 1846, because the proviso refers only to the *price* and not to the quantity. That is, it was considered that the word "amount" in the proviso in question, providing that duties shall not be assessed upon an *amount* less than the invoice value, does not refer to the quantity or weight of the goods. The same provision occurs in the customs administrative act as the last sentence of

section 7. Thus the report of the case of *Weaver & Sterry* v. *Saltonstall* does not indicate that the correlative claim of increased value per unit of weight due to improved condition in proportion to loss of weight was presented to the court or was decided.

In consequence of that decision T. D. 9305 was promulgated in 1889, in which the present rule was defined (referring to T. D. 8159 and 8591) as follows: That duty should be levied upon the invoice or entered value where a lump sum is paid for the merchandise, without referring to the precise number of pounds or tons landed, the value per pound or ton to be ascertained by dividing the value of the entire invoice by the quantity shown by the weigher's return; and in case the merchandise is invoiced at a price per unit of weight, then that price shall be understood as the unit of value to which the statutes refer (section 2900, Revised Statutes, now incorporated in section 7 of the customs administrative act), and the appraised value can not be less than such unit of value per unit of weight, but may be advanced in case the appraiser and collector should find that the foreign market value of the goods in the condition in which they are entered should exceed the price per unit of weight specified in the invoice.

> In the case of castile soap and other commodities where the difference between the invoice weight and the weigher's return may be due to evaporation or other like causes, and it appears to the satisfaction of the appraiser and collector that the foreign market value per

> pound of the goods landed has proportionately enhanced, so that there has been no diminution of the total entered value of the invoice *in the foreign market* notwithstanding the shrinkage in weight, it would seem to follow that the foreign market value per pound would be represented by the result which would be obtained by dividing the total foreign market value of the invoice by the number of pounds landed. (T. D. 9305.)

The regulation to which these Treasury decisions refer as No. 604 appears in the present edition (1899) to be No. 1453, which refers to T. D. 9305 and is as follows (art. 1453):

> Where a deficiency of weight may have been produced by evaporation during the voyage, *or other like causes*, and it appears to the appraiser that *the foreign market value per pound has been proportionately enhanced*, so that there has been no diminution of value by loss of weight, the dutiable value may be obtained by dividing the total entered value by the number of pounds landed, and the appraiser will make a corresponding addition to the invoice value.

This has been the Treasury construction of the law since T. D. 9305 was promulgated in 1889, under the law before the customs administrative law was systematized in 1890, and ever since that time.

The decisions have foreshadowed the view of the court on the equity actually involved here in cases where that equity did not appear. We should find it hard to believe that a view of the law which was with-

out equity or justice and without sense or logic as well, which involved an entirely absurd and unreasonable result, could be a correct view of the law any more than a sound equitable construction. A case cited by the learned counsel (*Farmers' Loan and Trust Co.* v. *Oregon Ry. Co.*, 24 Fed. Rep., 407) states the rule which this court has often stated regarding the construction of an act by surmise or conjecture, and denying the right of courts to interpolate or strike out language in a law in order to avoid supposed incongruities. One of the last examples of that ruling by this court is found in *United States* v. *Goldenberg* (169 U. S., 95, 103):

> No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

But those decisions relate to cases where it was necessary, perhaps, to do some violence to the language of the law in order to reach what was claimed to be a logical or just construction. Here, on the other hand, it is purely a matter of construing the language of the law exactly as it is, and the question is merely whether such construction to be sound may or may not regard, as tending to show the legislature's real intent, such lights upon the language as the circumstances of the case and considerations of common sense, as well as rules of logic and equity, may furnish.

Recurring, then, to decisions which approach the determination of this question: In the case of *Marriott* v. *Brune*, heard first below as *Brune* v. *Marriott*,

arising under the tariff act of 1846—and with reference to administration under the tariff act of 1842 as well—before Chief Justice Taney, sitting on circuit (Taney, 132), it was determined that the effect of the sixteenth section of the tariff act of 1842 (5 Stat., 563) [which is substantially preserved in sections 10 and 19 of the customs administrative act] was, whenever an ad valorem duty was imposed, to charge it only upon the amount of merchandise actually imported. It is clear from the language of the learned Chief Justice that there probably was in this case an actual "diminution in value" which was occasioned "by damage to the quality on the voyage or loss in quantity." Besides that reference to actual loss to the importer, the court says:

> If the duty is charged upon what is lost as well as what arrives, he will in fact pay, in almost every case, a higher duty on his importation than the law intends to impose. * * * It would hardly comport with this policy [the liberal spirit of the tariff of 1846] to place in the law a proviso which, upon articles so important in commerce as sugar and molasses, would in many cases make the duties higher than they had ever been before, and, indeed, in almost every cargo make them higher than the rate specified in the law. We think the proviso refers to the price stated in the invoice, and not the quantity, and did not repeal the former law authorizing deductions and allowances to the importer in the cases mentioned.

Here the Government does not claim a right to interfere with the rule upon quantity, and as to the price, the language quoted, we contend, implies very clearly that if the total value arrives in this country, nothing less than that shall be taxed, and justifies also the inference, upon which the Treasury regulations proceed, that the price per unit of weight may be advanced so as to make, multiplied by the number of weight units actually arriving, the invoice value in gross.

In the Supreme Court the decision below in *Marriott* v. *Brune* was affirmed, the statement of the syllabus being that "duty is to be assessed, not upon the weight of sugar in the invoice, but the weight when landed; although no express direction is contained in any law to make an allowance for loss of weight of sugar by drainage; and although the aggregate value is thus reduced below the aggregate cost named in the invoice." (And see *Lawrence* v. *Caswell*, 13 How., 488.)

Before pointing out the significant difference between that case and this, it will be proper to quote from the reasoning of the decision on which the result was reached.

> The invoice may be prima facie evidence of the result of this and other causes in establishing that price [the price abroad]; but for a quarter of a century it has been departed from by the appraisers if the facts ascertained by them will warrant it; *though their action and decision as to the price are understood not to be here in this respect in controversy.*

Commenting upon the law that the duty shall not be assessed upon an amount less than the invoice value, as apparently relating to the enactment that the owner may raise the assessment to the true market value in the country whence the importation was made, the court proceeds:

> If, however, it was meant to be general, as seems more likely from previous laws, and to hold the owner to his invoice in all cases by a species of estoppel, so far as not to let it be made lower than was originally admitted in the invoice, then the restriction manifestly relates to the price only. He need not be estopped about the quantity in the invoice, as the duty is not assessed on the quantity abroad, but on the quantity reaching home and entered and ascertained by law by the measurer and weigher here. But he might properly be in respect to the price, as it is on the price abroad and charges added that the duty is by law to be assessed.

Now, if the owner is estopped from questioning his own invoice price, although he is permitted to show the actual weight landed, notwithstanding the invoice, is he not upon the same principle estopped from questioning the price which he actually and finally pays by his own arrangement with relation to the quality and condition of the goods when landed, although that is not the price of the invoice? That the court had in mind the question which has now come to an issue is shown by the following paragraph as the final reason why the quantity actually received should be the quantity

assessed: "Nor is his sugar improved in quality by the drainage so as to raise any equity against him by it. The evidence in the ensuing case from New York, which was argued with this, shows that the article usually becomes of a worse color and quality than before, though if not drained at all, it might ferment and become still more inferior. And the "ensuing case" was the case of *United States* v. *Southmayd*, in which the court says:

> Again, if the owner was benefited by this drainage in the improved quality of the sugars or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad; but, as explained in the preceding case, such does not seem to be the current of the evidence.

Counsel for the importers quotes this decision *in extenso*, although we contend that, like *Marriott* v. *Brune*, it is of the greatest authority and significance in the Government's favor. The court obviously would have sustained an addition to the invoice price if the evidence had justified that course, because they say:

> If the price is fixed too low there, or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price, and it must be presumed they would raise it if required by all the facts. * * * Again, the duty here is regulated by law, * * * and by law it is imposed on the quantity entered here, and

not the quantity shipped abroad, and on the *true* price abroad *as estimated by the appraisers*, and not necessarily as estimated by the owners.

The learned counsel are perhaps conscious of the adverse stress of this case, because they interpolate a passage in the opinion as given on pages 22 and 23 of their brief pointing out that the price was raised here legitimately in accordance with the court's view when it was fixed at 6s. 8d., and that they are only complaining of the further advance to cover increase of value during the voyage. I find nothing in the record to indicate that the invoice price was less than 6s. 8d. (Rec., No. 225, pp. 15, 16) in the importations by the *Swan* and *Richmond*, or than 7s. 2d. by the *Bellaura*, to which the addition was made to reach the market value when shipped. The clear inference from the record is that the "market value when shipped" per hundredweight was the invoice value, and that only one addition was made by the appraisers. This is confirmed by the state of the case in No. 236 (p. 10), by which it appears that the *Cuvier's* cargo was advanced from an invoice value of 10s. 0d. per weight unit to 11s. 11d. In other words, in all importations there was only one advance and it was for the same reason in each. It will be observed that there was a similar purchase arrangement in the Southmayd case, namely, "when sugars of this kind are purchased abroad the buyer usually takes into consideration in fixing the price that the drainage or waste in weight will probably equal near 5 per cent on the whole. It is argued that the

price abroad is therefore lower in this proportion on this account; and hence that no deduction should be made here for what is taken into consideration there."

It is evident, I think, that the only reason why this argument was not considered in that case was because the court says the current of evidence shows that the owner was not benefited by improved quality due to drainage. In the present case it is clear that he is benefited and that there is no substantial corresponding loss. The agreement simply is that the loss in weight shall not exceed a certain per cent, or, if it does, that the price shall be reduced ratably and that the polariscopic test of quality shall be an element in fixing the price. In the earlier days it is likely that the failure to improve in quality, or the actual deterioration, was due to the nature of the sugar or the conditions of packing and stowage on the voyage. The *Marriott* v. *Brune* case shows that sugar cargoes sometimes fermented, and the quality test then was the color test and not the polariscopic test, which now shows unerringly the relative quality when shipped and when landed.

The learned counsel, arguing on the proposition, which we claim is disproved in the case, that there has been a substantial loss of real value of sugar or saccharine matter, proceeds to contend that the duty must be levied, collected, and paid on sugar and not on *sucrose*, which is a chemically pure substance and with which various impurities and a certain percentage of water are combined in *sugar*. But the reply to that is

that it is sugar still, and not sucrose, which arrives in this country, but the sugar is more valuable just in proportion to the water drained and just as their own tests show.

The case of *Earnshaw* v. *Cadwalader* (145 U. S., 247, 259) is not at all similar. The importer there contended that the dutiable weight assessed by the collector was made up of water mechanically present in iron ore, and that he should receive the benefit of the reduction of moisture after drying in the sun or by artificial heating. The case was disposed of by the court on the ground that *dried ore* was unknown to commerce, and that water in mechanical combination with ore is one of its natural and constant constituents. The learned counsel's quotation from the case (p. 19) contains the following passage: "Held, that it was the duty of the collector to assess the duty upon the ore in its condition at the time as of which he was required to appraise it, including the percentage of water it contained." I do not find that passage in the opinion, although it is obvious that by its "condition at the time as of which he was required to appraise it" must necessarily be meant its condition when it *was* appraised, because the result of the case was "that duty was assessable on the number of pounds of iron ore reported by the United States weigher, and not on the ore after the moisture was dried out of it." That is to say, it was appraised here in the condition in which it was weighed, and in that condition its foreign market value was fixed. On this point of the con-

dition as imported, being the test for dutiability, see *Worthington* v. *Robbins* (139 U. S., 337) and *United States* v. *Schoverling* (146 U. S., 76). Appraisement as well as classification appears to require the same rule.

CONCLUSION.

It does not seem necessary to delay the court by further citation of authorities. The strict legal question is whether an importer, whose interests in case of actual loss or damage are fully and equitably protected, shall have the benefit of the weight when landed as the proper test of weight, and shall also have the benefit of the foreign-market value of the quality which was shipped, much inferior to that which was landed, although the loss of weight has caused no loss to him and although both on weight and quality he is fully protected against the shipper by his price agreement. Does the statute permit that result?

A practical aspect of the question may be put as follows: Is it legal any more than equitable for an importer to stand on the established law as to dutiable weight, and, expecting to establish his contention as to foreign market value, arrange his business so as to ship a commodity which loses in weight and gains in quality on the voyage, and then complain because he is assessed on the *foreign market value* of that improved quality? Can he logically or justly say that the quality of his sugar when landed here, which is identical with the quality which it would have possessed if it had drained in a Brazil warehouse before it was

shipped, is not the "condition" to which the statute refers? We respectfully submit that the "condition" of section 19 of the customs administrative act does not refer to the inferior quality of the sugar when it leaves Brazil. The value per unit of weight in the foreign market of the sugar of the quality which was landed is the legal test. This is the value which the appraisers determined. All reasonable presumptions are in favor of the finality of their conclusion, as the authorized Government experts upon this subject. They did not proceed "upon a wrong principle, contrary to law."

We respectfully submit that the appraisements in these cases should be sustained and the judgment of the courts below be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

FEBRUARY 19, 1901.

The COLLECTOR OF CUSTOMS,
New York, N. Y.

SIR: Referring to your letter of the 2d instant, transmitting the application of Charles A. Schieren & Co. for the remission of the additional duty, in amount $189.12, levied under section 32 of the act of July 24, 1897, on certain hides imported per *Statendam* July 9, 1900, entry No. 112559, I have to state that from the facts as shown by your report it would seem that there is a technical but not an actual undervaluation of the hides, if the condition in which they were shipped is taken into consideration. Green hides were exported and the invoice appears to correctly state the value for such hides at the date of exportation. The amount or extent of shrinkage of any given number of hides on a voyage of importation must be a matter largely of conjecture, for the maker of an invoice can not, with any degree of accuracy, foretell what such shrinkage will be. I do not believe that the framers of the act had in contemplation the imposition of additional duties in cases of this kind. However, the importers' equities in this case are so strong that I am loath to deny relief, and I have to request an expression of your opinion as to whether in such cases the quantity actually landed multiplied by the unit of value as found by the appraiser should not be considered the appraised value, or whether the quantity shipped multiplied by the unit

of value stated in the invoice should not be taken as the invoice value, for the purpose of determining whether there is or is not undervaluation.

Respectfully,

O. L. SPAULDING,
Assistant Secretary.

OFFICE OF THE COLLECTOR OF CUSTOMS,
Port of New York, N. Y., March 6, 1901.

The Honorable
THE SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt of Department's letter of February 19, 1901 (3878–K.) (A. J.), relative to the application of Charles A. Schieren & Co. for the remission of the additional duty, amounting to $189.12, levied under section 32 of the act of July 24, 1897, on certain hides imported by them in the *Statendam*, July 9, 1900, entry No. 112559.

I have carefully considered the views expressed by the Department in its letter of February 19, 1901 (3878–K.), particularly that portion requesting an expression of my opinion whether the quantity actually landed multiplied by the unit of value as found by the appraiser should not be considered the appraised value, or whether the quantity shipped multiplied by the unit of value stated in the invoice should not be taken as the invoice value, for the purpose of determining whether there is or is not undervaluation.

As to the particular case under consideration, I have to state that if the total aggregate entered value is compared with the total aggregate appraised value there will be no advance, and a treatment on that line of

comparison would accord with Department's ruling of April 16, 1896 (1531 H.), in the case of the Franklin Sugar Refining Company at Philadelphia, said Department's letter being addressed to the collector of customs at Philadelphia, Pa. As to the adoption as a general rule of the method suggested, I am of the opinion that it would be inimical to the best interests of the Government for the following reasons:

First. Section 10 of the act of June 10, 1890, requires that the appraiser shall "appraise (any invoice or affidavit thereto or statement of cost * * * to the contrary notwithstanding) the actual market value and wholesale price of the merchandise, at the time of exportation to the United States, in the principal markets of the country whence the same has been imported;" hence, the appraising officers appraise and return to the collector the market price per unit, and not the total value of the aggregate units. Moreover, at the time of appraisement the appraising officers, as a rule, are not acquainted with the number of units landed in the United States, as shown by the return of the United States weigher.

Second. Section 32 of the act of July 24, 1897, requires that the additional duty imposed thereby shall be levied on the particular article or item on the invoice that is advanced irrespective of other similar items. Article 1266 of the Customs Regulations of 1899 requires that the appraiser shall make his addition in a specific sum per pound, yard, or other unit of value, and not by percentage, and in the weight, gauge, or measure expressed in the invoice. Article 1267 of the Customs Regulations of 1899 requires that the invoice shall be forwarded by the appraiser to the collector, who (the collector) will at once give

notice of the advance to the importer on Form Cat. 600. This notice is invariably given before the liquidation of the entry, so that the question of valuation may be determined in the manner prescribed by law before the collector assessed the duty. This action of giving notice to the importer so that he may avail himself of the prerogative of section 13, act of June 10, 1890, is in harmony with the law, as section 13 distinctly states that the appraised value or the reappraised value by one of the general appraisers, or the reappraised value by the board of three general appraisers, as the case may be, is the basis or value upon which the collector shall levy the duties, "and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law."

Third. Article 1419 of the Customs Regulations of 1899 requires that duties must be assessed on the actual quantity imported, as shown by the return of the United States weigher.

Fourth. Article 1431 of the Customs Regulations of 1899 distinctly states that the "additional duty is not incurred by a simple excess of quantity ascertained on importation over the quantity expressed in the invoice, but only where the value of the article, as given in the invoice and entry, shall be below the appraised value. The regular duty is, however, to be assessed on the excess ascertained."

Fifth. Article 1453 of the Customs Regulations of 1899 states "where a deficiency of weight may have

been produced by evaporation during the voyage, or other like causes, and it appears to the appraiser that the foreign market value per pound has been proportionately enhanced, so that there has been no diminution of value by loss of weight, the dutiable value may be obtained by dividing the total entered value by the number of pounds landed, and the appraiser will make a corresponding addition to the invoice value." This rule is not understood to be mandatory, but permissible. This article (1453) emanated from T. D. 8159, prior to which this office held, as in the case of castile soap, that the invoice value represented the quantity landed when the said landed weight was less than the invoice weight, and the importers received the full complement of their importation, to wit, the full number of boxes and the full number of bars of soap in the boxes.

The theory upon which such action was based was predicated on the fact that the soap was worth as much in its hardened and shrunken condition at the time of its being landed in the United States as it was in its green state when shipped from the foreign country, and consequently there should be no rebate of duty for the difference in the weight of the soap as shown by the return of the United States weigher. This view was overruled by the Department on April 4, 1887 (see T. D. 8159), which decision was subsequently revoked by the Department on August 10, 1887, T. D. 8380. The latter decision of the Department, T. D. 8380, became the subject of litigation, and was overruled by the courts (see T. D. 9305 and Federal Rep., vol. 38, p. 493); hence the framing of article 1453 of the present Customs Regulations. In T. D. 10593 the Department held that it was the item that carried the penalty and not the aggregation of all similar items.

Sixth. It is respectfully submitted that to mix the questions of weights and values together for the purpose of determining the percentage of advance would be mathematically incorrect, and if adopted as a general rule would lead to inexplicable confusion.

In cases where it is shown that the appraiser's advance, or any portion thereof, was made for the purpose of compensating for the changed condition of the imported merchandise between the time of its shipment from the foreign country to its importation into the United States, such change being beyond the control either of the exporter or the importer, it would seem only fair and equitable that the appraiser's advance, or such portion thereof that was made for the purpose of making good the changed condition of the article, should not be held as an advance per se by the appraiser to make market value, but only that portion of the appraiser's advance should be charged against the importer in computing the percentage of advance as was made in fact to make the per se market value of the unit. If the rule was confined to such exceptional cases, it would be, in my opinion, as far as the Department might safely go.

Respectfully, yours,

J. J. COUCH,
Special Deputy Collector.

APRIL 16, 1896.

COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

SIR: The Department is in receipt of your letter of the 30th ultimo reporting further upon the application of the Franklin Sugar Refining Company, that their

entry, dated March 29, 1895, covering certain muscovado sugar per *Motley* from Pernambuco be liquidated without the assessment of penal duties.

You report that the entry covered 11,511 bags, invoiced at a weight of 1,903,170 pounds, and entered at the value of $23,847; that the weigher's return at your port showed that there were 1,616,197 pounds landed, which amount was appraised by the Board of General Appraisers upon reappraisement at a total value of $24,268. The loss of 287,073 pounds is accounted for by drainage on the voyage of importation. You report further that the invoice price per hundredweight was 5s. $9\frac{1}{5}$d.; that the appraised value was 6s. $9\frac{3}{4}$d., which latter value was advanced to 6s. 11d. by the general appraiser upon reappraisement proceedings; that the polariscopic test stated as the basis of the price in the invoice was 87°; that the actual polariscopic test at your port was $86\frac{7}{10}$°, and that the actual test on the date of shipment was approximately 82 per cent, thereby showing an increase in polarization of a little less than 5°, due to drainage on the voyage of importation.

It appears from the evidence submitted in this case that it is the practice in the sugar trade to invoice the estimated test of Brazilian sugars at from 1 to 5 degrees above the actual test at its time of importation, in order to allow for the increase in polarization from the voyage of importation. It also appears that the prospective loss in weight had been discounted in the invoice price of the said sugar.

As the appraised value of the entire shipment ($24,268) does not exceed its entered value ($23,847) by more than 10 per cent, it is the opinion of this Department that no penal duties have accrued, and that

the entry should be liquidated, charging only the regular duties due. You will please be governed accordingly.

Respectfully, yours,

C. S. HAMLIN,
Assistant Secretary.

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